

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL WOMMER,

Defendant.

Case No. 2:10-cr-00596-GMN-GWF

**REPORT AND
RECOMMENDATION**

Motion to Dismiss Count Four of the
Superceding Indictment (#45)

This matter comes before the Court on Defendant's Motion to Dismiss Count Four of the Superceding Indictment (#45), filed on November 4, 2011. The government filed no response to this motion.

BACKGROUND

On December 14, 2010, the Defendant was charged in a fourteen-count Indictment, alleging Structuring Financial Transactions in violation of 31 U.S.C. §§5324(a)(1), (a)(3), (d)(1) and (d)(2) and Aiding and Abetting in violation of 18 U.S.C. § 2. On June 29, 2011, Defendant filed a Motion to Dismiss (#15), arguing that the Indictment should be dismissed for failure to state a cause of action or, in the alternative, as multiplicitous as to Counts II through VIX. The Court conducted a hearing and issued a Report and Recommendation granting Defendant's motion as to Counts I through XIII of the Indictment. The Court further granted the government leave to file an amended Indictment.

On September 20, 2011, the government filed a Superceding Indictment (#30), charging Defendant with three counts of Structuring Financial Transactions in violation of 26 U.S.C. §7201, one count of Tax Evasion in violation of 26 U.S.C. §7201, and one count of Making or Subscribing

1 a False Return, Statement, or Other Document in violation of 26 U.S.C. § 7206(1). Defendant now
 2 brings this motion requesting the Court dismiss Count Four of the Superseding Indictment (#30),
 3 which charges Defendant with Tax Evasion in violation of 26 U.S.C. § 7201. The Government has
 4 not filed a response to the motion.

5 DISCUSSION

6 Defendant moves for dismissal of Count Four of the Indictment arguing that no tax
 7 deficiency is alleged, and none exists, to support the charge of Tax Evasion. Defendant contends
 8 that the indictment only alleges his failure to pay “\$13,020.20 in interest and penalties,” and
 9 because interest and penalties are not actual taxes, the indictment fails to allege an element of the
 10 crime. The elements of tax evasion under 26 U.S.C. § 7201 are: “(1) willfulness; (2) the existence
 11 of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the
 12 tax.” *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007); *see also Sansone v. United*
 13 *States*, 380 U.S. 343, 351 (1965). “A tax deficiency occurs when a defendant owes more federal
 14 income tax for the applicable tax year than was declared due on the defendant's income tax return.”
 15 *Id.*; *see also*, 9th Cir. Crim. Jury Instr. 9.35 (2005).

16 While the Ninth Circuit has not addressed this specific issue, the Fifth Circuit addressed it
 17 in *United States v. Wright*, 211 F.3d 233 (5th Cir. 2000). In *Wright*, the defendant argued that his
 18 conviction for tax evasion under 26 U.S.C. § 7201 was improper because he only owed interest and
 19 penalties, but no actual tax. *Id.* at 236. In analyzing the defendant's argument, the court reasoned,

20 The Supreme Court has held that the elements of Internal Revenue
 21 Code (“I.R.C.”) § 7201, the provision criminalizing the evasion of
 22 taxes, include the existence of a “tax deficiency.” *See Sansone v.*
 23 *United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 13 L.Ed.2d 882
 24 (1965). While § 7201 does not describe “tax deficiency,” it is defined
 25 elsewhere in the IRC as the amount by which the tax exceeds the tax
 26 reported on the return plus the amounts previously assessed as a tax
 27 deficiency. See I.R.C. § 6211. The IRC specifically excludes interest
 28 from being treated as tax for purposes of deficiency procedures. See §
 6601(e). The Sentencing Guidelines also exclude interest and
 penalties in assessing the penalty for tax evasion. *See U.S. Sentencing*
Guidelines Manual, § 2T1.1 & App. Notes; *United States v.*
Clements, 73 F.3d 1330, 1339 (5th Cir.1996).

Although the deficiency procedures are separate from the criminal
 liability provisions, we are persuaded that the definition of “tax
 liability” excluding penalties and interest extends to §7201. We

decline to assume a broader meaning for a “tax deficiency” under § 7201 than under a deficiency preceding provision, especially when §7201 attaches criminal liability to the debt owed.

211 F.3d at 236.

The Fifth Circuit’s analysis is persuasive. There is no evidence before the Court that an actual tax deficiency exists. The Superseding Indictment (#30) alleges that the Defendant

...did willfully attempt to evade and defeat the payment of a part of the income tax due and owing him to the United States of America for the calendar year 2007, in the amount of \$13,020.20 in interest and penalties...

In 2007, the Defendant’s income tax return indicated a tax liability of \$28,339.00. By February 1, 2010, Defendant had satisfied that tax liability in full; however over the course of payment, the IRS assessed an additional \$19,000.00 in interest and penalties. Defendant disputed the penalties and interest, but the IRS refused to waive them. Defendant’s 2008 and 2009 tax returns entitled him to a tax refund. Those refunds however were applied directly to the penalties and interest assessed. Defendant’s remaining balance is \$13,020.20, as forth in the Superseding Indictment.

Count Four of the Superseding Indictment alleges Defendant owes interest and penalties, but fails to allege any taxes owed. For the purposes of §7201, interest and penalties are not considered tax. The Superseding Indictment therefore fails to allege a tax deficiency, which is a necessary element. *See United States v. Lawn*, 355 U.S. 339, 360 (1958) (“A conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency.”) Count Four of the Superseding should therefore be dismissed.

The Government’s failure to respond to Defendant’s motion also supports the granting of the motion. Pursuant to LR 7-2(d), “failure of an opposing party to file points and authorities in response to any motion shall constitute a consent to the granting of the motion.” Accordingly,

RECOMMENDATION


IT IS HEREBY RECOMMENDED that Defendant Paul Wommer’s Motion to Dismiss Count Four of the Superseding Indictment (#45) be **granted**.

...

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 9th day of December, 2011.



GEORGE FOLEY, JR.
United States Magistrate Judge